



Federal Communications Commission
Washington, D.C. 20554

September 21, 2010

Shirley S. Fujimoto, Esq.
Fish & Richardson P.C.
1425 K Street, N.W., 11th Floor
Washington, DC 20005

DA 10-1792

Re: Xcel Energy Services, Inc.
Request for Waiver of the Commission Rule Section 90.617
File No. 0002880474

Dear Ms. Fujimoto:

This addresses the above-captioned application to modify the license for Station WPAL525, and the accompanying waiver request, filed by the Xcel Energy Services, Inc. ("Xcel").¹ Xcel seeks to modify the license for Station WPAL525 by adding the frequency pairs 815/860.0625 MHz and 815/860.5625 MHz for private, non-commercial use in connection with Xcel's operations at the Prairie Island Nuclear Generating Plant ("Prairie Island") and the Sherbourne County Generating Plant ("Sherco").² Because Xcel proposes private, non-commercial use, and the requested frequency pairs are in the Specialized Radio Mobile ("SMR") Category, it requests a waiver of the SMR eligibility requirements set forth in Section 90.617(d) of the Commission's Rules.³ For the reasons stated below, we grant the waiver request.

Background. Xcel, a multi-state energy services and delivery company, through its subsidiaries, generates, transmits, and distributes electricity and distributes natural gas to approximately 3.3 million electricity customers and 1.8 million natural gas customers in Minnesota, Wisconsin, Michigan, North Dakota, South Dakota, Colorado, New Mexico, and Texas.⁴ Xcel is licensed under Call Sign WPAL525 to operate a private land mobile radio system in the 800 MHz band, which it uses for communications in support of its critical utility operations in Minnesota and Wisconsin.⁵

In April 2006, as part of 800 MHz band reconfiguration, Xcel relinquished its frequency pairs in the General Category, and received assignment of replacement frequencies in the SMR Category, among them the frequency pairs 814/859.0125 MHz and 815/860.0125 MHz.⁶ At that time, Xcel held the license for the frequency pair 814/859.0125 MHz at one location, and for the frequency pair 815/860.0125 MHz at six locations in the greater Minneapolis, MN area.⁷ On January 16, 2007, Xcel filed an application to modify the license for Station WPAL525 to add these two frequency pairs to the Sherco and Prairie Island

¹ See FCC File No. 0002880474 (filed Jan. 16, 2007) (Modification Application and Waiver Request). The application was amended on January 17, 2007 (1/17/07 Supplement), February 6, 2008 (2/6/08 Supplement), May 28, 2008 (5/28/08 Supplement), September 24, 2009 (9/24/09 Supplement), October 1, 2009 (10/1/09 Supplement), October 2, 2009 (10/2/09 Supplement), and October 7, 2009 (10/7/09 Supplement).

² See 10/7/09 Supplement at 1.

³ See *id.* at 2-3. See also 47 C.F.R. § 90.617(d).

⁴ See Modification Application and Waiver Request at 1.

⁵ See *id.* at 1.

⁶ See *id.* at 2.

⁷ See *id.*

locations.⁸ On February 6, 2008, Xcel filed an amendment to its modification application and waiver request, informing the Commission that on June 18, 2007, Xcel requested cancellation of its authorization to use these two frequency pairs at the then-licensed locations, but reaffirmed its need for the frequency pairs at the Sherco and Prairie Island locations.⁹

On June 5, 2009, the Commission returned Xcel's application, stating that the application did not include requisite frequency coordination and the 800 MHz Transition Administrator's ("TA") approval, and also noting that Xcel's proposed use of the 814/859.0125 MHz and 815/860.0125 MHz frequency pairs at the Sherco and Prairie Island locations would violate the co-channel protection requirements in section 90.621 of the Commission's rules with respect to licensee 21st Century Wireless Group.¹⁰ Xcel subsequently clarified that the application was properly coordinated, and, on June 11, 2009, the Commission reinstated the application to pending status. However, in the interim, the frequency pairs 814/859.0125 MHz and 815/860.0125 MHz were licensed to a different licensee and Xcel amended its modification application and waiver request, substituting the frequency pairs 814/859.0125 MHz and 815/860.0125 MHz with 815/860.0625 MHz and 815/860.5625 MHz.¹¹ These frequency pairs have been identified by Sprint Nextel Corporation ("Sprint") and the 800 MHz TA as available for licensing.¹² Because they are in the SMR Category, Xcel reaffirmed its request for a waiver of the eligibility and use restrictions set forth in Section 90.617(d) of the Commission Rules.¹³

Xcel's Request. Xcel claims that its unique circumstances meet the Commission's requirements for grant of a waiver, as set forth in Section 1.935(b)(3)(i)-(ii) of the Commission's Rules.¹⁴ Specifically, it states that the purpose of the SMR eligibility and use restrictions – *i.e.* to ensure delivery of SMR service --would not be frustrated by the Commission's grant of the waiver, as Sprint is currently providing SMR service on several frequencies in the Minneapolis area.¹⁵ Moreover, the replacement frequencies have been recommended by Sprint and 800 MHz TA as suitable replacements for the frequency pairs originally requested by Xcel.¹⁶ Xcel also states that there are no available channels in the Business or Industrial/Land Transportation ("I/LT") Category at the requested locations.¹⁷ In addition, Xcel asserts that a grant of the waiver is in the public interest as it will enable power station personnel to reliably communicate to maintain a high level of safety, provide continuous energy services in the Minneapolis area, and promptly respond during emergencies.¹⁸

⁸ See *id.* at 1.

⁹ See 2/6/08 Supplement at 1.

¹⁰ See FCC File No. 0002880474, *Notice of Return*, Ref. No. 4870167 (dated June 5, 2009).

¹¹ See 9/24/09 Supplement at 1.

¹² See *id.* The amended application contains a letter of short-spacing concurrence from Sprint. See *id.*, Attachment at 1.

¹³ 47 C.F.R. § 90.617(d).

¹⁴ 47 C.F.R. § 1.925(b)(3)(i)-(ii). To obtain a waiver of the Commission's rules, a petitioner must demonstrate either that: (i) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the present case, and that a grant of the waiver would be in the public interest; or (ii) in view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative.

¹⁵ See Modification Application and Waiver Request at 3.

¹⁶ See 9/24/09 Supplement at 2.

¹⁷ See 10/1/09 Supplement at 2-3; Modification Application and Waiver Request at 6.

¹⁸ See Modification Application and Waiver Request at 5.

Discussion. We conclude that grant of a waiver to Xcel is warranted because the underlying purpose of Section 90.617(d) of the Commission's Rules would not be served by strict application of the rule in this case. Section 90.617(d) specifically states that the channels listed in that subsection are available only to applicants in the SMR Category.¹⁹ When the Commission adopted Section 90.617(d) of the Rules, it sought to avoid a potential scarcity of radio frequencies for Public Land Mobile Radio ("PLMR") use by stopping the then prevailing practice of incorporating Business and I/LT channels into SMR systems.²⁰ Here, an I/LT licensee seeks access to a channel in the SMR category and a waiver grant does not undermine the underlying purpose of the prohibition against such intercategory sharing.

Moreover, grant of this waiver request is in the public interest given the narrowly tailored facts of this case, where relief is afforded to a critical infrastructure entity that will use this spectrum for communications to ensure continuous energy service in the Minneapolis area, including critical communication by its work crews during emergencies, as well as constant monitoring of radiation levels at its nuclear power station. We also find that Xcel has demonstrated that it has no reasonable alternative to using these frequencies. Lastly, a waiver grant is further supported by the fact that: 1) the requested frequencies were recommended by both Sprint and the 800 MHz TA; 2) Sprint has provided concurrence to any short-spacing; 3) there are no other affected co-channel licensees; and 4) Xcel's application was accompanied by proper frequency coordination.

Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.925 of the Commission's rules, 47 C.F.R. § 1.925, that the Waiver Request filed by the Xcel Energy Services, Inc. with respect to application FCC File No. 0002880474 IS GRANTED as noted herein.

IT IS FURTHER ORDERED that FCC File No. 0002880474 is hereby granted.

This action is taken under delegated authority pursuant to Sections 0.191 and 0.392 of the Commission's rules, 47 C.F.R. §§ 0.191, 0.392.

Sincerely,

Roger S. Noel
Chief, Mobility Division
Wireless Telecommunications Bureau

¹⁹ 47 C.F.R. § 90.617(d).

²⁰ Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, *First Report and Order*, *Eighth Report and Order*, and *Second Further Notice of Proposed Rulemaking*, 11 FCC Rcd 1463, 1537 ¶ 141 (1995) (*800 MHz SMR Report and Order*).